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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1392

GEORGE F. GOTTSCHALK, JR.,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Alaska entered in the above entitled case on November 9, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Alaska is not yet officially reported. The opinion is reprinted in the Appendix commencing on page 15.

JURISDICTION

The judgment of the Supreme Court of Alaska was entered November 9, 1979. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. §1257(c).

QUESTION PRESENTED

Whether the fundamental rights of a defendant to effective assistance of counsel and to effective confrontation of witnesses testifying against him are violated when:

(1) A defendant has not waived his right to counsel, has diligently attempted to secure counsel, has secured counsel before commencement of the State's evidence and when that chosen counsel is enroute to the place of trial and the trial court denies defendant's motion for a short continuance;

(2) the trial court knows counsel chosen by the defendant is enroute to the place of trial and will arrive imminently, and when defendant seeks the assistance of counsel on jury instructions, requesting a short continuance and the trial court denies the same;

(3) the trial court dismisses the prosecution witnesses over the objection of defendant while prospective counsel is present in the courtroom, thus denying defense counsel an opportunity to cross-examine the State's witness, and the trial court fails to grant a reasonable continuance to permit defense counsel to consult and prepare a defense.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner was indicted for the crime of Grand Larceny on August 9, 1976. Petitioner was brought to trial; the jury hung the verdict, including the lesser included offense of Petty Larceny. Immediately, a second trial was scheduled for September 21, 1977. After a second jury trial in the Superior Court for the State of Alaska, Third Judicial District, Naknek, Alaska, Petitioner was convicted of Petty Larceny. A sentence of six months imprisonment, three months suspended with probation for two years, and restitution of $250.00 was imposed. Petitioner requested the court, prior to trial, and repeatedly during trial, for continuances in order to permit him to acquire assistance of counsel, and the questions presented for review in this petition arise out of the repeated refusal of the court to grant Petitioner's request for continuances for the specific and stated purpose of procuring assistance of chosen counsel.

Petitioner is a fisherman in Naknek, Alaska. The village community of Naknek, Alaska, offers few of the services regularly provided in larger urban areas. Naknek has no regularly scheduled airline service from Anchorage, Alaska, the closest metropolitan area. Naknek is ten miles distant and connected by road to King Salmon, Alaska, and is served by a daily flight from Anchorage, Alaska. The village communities of Naknek and King Salmon do not offer a practicing attorney. The court, its staff, the prosecution and counsel for defendants all travel to Naknek for trials.

At least a month before the second trial, Petitioner, who was without counsel, contacted the court regarding a continuance. (T. 107) The court instructed Petitioner to contact Assistant District Attorney Mackey. Upon doing so, Mackey informed the Petitioner that the matter of the continuance was a matter of decision for Assistant District Attorney Eugene B. Cyrus. Mackey further informed the Petitioner that he had no objection to a continuance. Petitioner then attempted to contact Cyrus, who was out of the office for a week, and was unable to reach him in regard to the continuance. (T. 107)

Eight or nine days prior to scheduled trial of September 21, 1977, Petitioner, still without representation of counsel and without economic means to procure counsel, renewed his efforts to obtain a continuance. Petitioner called Cyrus, requesting additional time to enable him to take his boat, which contained approximately 20,000 pounds of salted salmon for purposes of sale, to Seward, Alaska, informing him that if he sold the salmon, he would have the funds to hire an attorney. (T. 106) Assistant District Attorney Cyrus advised Petitioner he would oppose the continuance. (T. 106)

Trial commenced on September 21, 1977. Petitioner was not represented by counsel and had no means to employ one. The record discloses no hearing prior to trial regarding the absence of defense counsel. Petitioner did not waive his right to the assistance of counsel at the second trial. (T. 59) Jury selection commenced, continuing into the afternoon, and failing to impanel a full jury the court recessed for the day. That afternoon Petitioner finally secured a loan, which provided him the means to procure counsel.

Petitioner contacted and hired an attorney from Anchorage, Alaska, to assist in the defense of his case. Petitioner's counsel, attorney John Anthony Smith, practices and resides

in Anchorage, Alaska. Early the following morning, Petitioner's counsel called the court in Naknek from Anchorage. (T. 127) The court returned the call with the knowledge that Petitioner's counsel was coming to appear in court in Petitioner's behalf in Naknek on the first available plane that day. (T. 127, 128) The court was further aware that Petitioner's counsel was at that moment appearing in court on another matter in Anchorage. (T. 127) Petitioner's counsel again called the court in Naknek, before 9:00 a.m. while the court was still in the process of selecting jurors, spoke with the bailiff and informed the court that he was coming to Naknek on the plane that day to appear on behalf of Petitioner. (T. 127) During a short recess after seating the jury, the court was informed that Petitioner's counsel was coming immediately to Naknek by plane.[1] (T. 127-128) At this time, no evidence had been taken. (T. 128) Petitioner informed the court that he wanted Mr. Smith as his defense counsel and the court was aware that Petitioner now had funds to retain counsel, and that Petitioner had in fact contacted and chosen counsel. (T. 59) Petitioner then moved for a continuance until Monday, September 26, 1977 (it then being Thursday, September 22), to permit Petitioner consultation with his attorney in order to prepare a defense. (T. 127) The court denied Petitioner's first request for a continuance.

The prosecution's case commenced, and three witnesses testified. The prosecution's fourth witness was not present. The State then requested a recess to permit the witness to arrive from Dillingham, Alaska, by plane, noting that the

[1]/Apparently the first request for a continuance took place off the record during a short recess between the administration of the oaths to the jurors and the opening statement of the prosecution. The facts were placed on the record by the court, Petitioner's counsel and Petitioner after the jury retired. (T. 126-128)

witness was expected to arrive by plane between 11:00 and 11:30 a,m. (T. 55) The court granted the State's request, excused the jury until 1:00 p.m. explaining that the State would present the rest of its case upon the arrival of the absent witness. The court further instructed the jury that the case would conclude that afternoon, "if there are defense witnesses or if there aren't . . ." (T. 57)

The jury was then excused and the court proceeded to consider jury instructions. Again Petitioner informed the court of counsel's imminent arrival by plane, and requested, in view of counsel's imminent arrival, a brief continuance to have argument on the instructions held until his counsel could be present.

> Mr. Gottschalk: Taken that my attorney will be here on the Wien flight, that I would like to have the instructions held until the attorney can be here.
>
> The Court: Well, Mr. Smith has never filed any notice of appearance in this case. He is not going to be arguing the case.
>
> (T. 58)

Alarmed, Mr. Gottschalk protested:

> You mean that I will — that even if he comes here at this point in time I cannot have an attorney?
>
> (T. 59)

This colloquy between the court and the defendant followed:

> The Court: Well, it would be highly unusual to permit an attorney to appear in the middle of a case. You and he would have to review together if you want him to appear to argue the case. What he would be doing would be giving final argument. I think that if — we're two days into this case now and the first time that I learned that he might be appearing was this morning when you mentioned that you had managed to secure some funds to hire him. I think it — you've waived your right to have an attorney some time before and I ruled upon the voluntariness of that waiver and the reason I wouldn't appoint a public defender.
>
> Mr. Gottschalk: But prior to the second hearing I never waived a right to an attorney.
>
> The Court: Well, we went into that last February.
>
> Mr. Gottschalk: Yes, I understand that, Your Honor, but it wasn't a decision on my part not to have an attorney, it was the — I believe it was the — it was your position that we were going to try the case regardless of whether I had an attorney or not.
>
> The Court: That's right. If you would have been eligible to have a public defender appointed I would have appointed a public defender to represent you last February. And then, of course, there was no application in between times. In fact, nothing happened in this case between February and September except it was continued a couple of times. We'll at least wait to see if Mr. Smith arrives or not. You'd best — and if he's here, outside the presence of the jury, why, we'll have an argument and find out . . .

(T. 59-60) Although the court granted the State's request for a recess in order to procure the State's witness, the court would not grant the Petitioner's request for a continuance to permit him assistance of counsel in his defense. The court concluded the consideration of jury instructions; Petitioner was still without assistance of counsel. (T. 60)

The court reconvened after recess, the State continued its case, presenting the prosecution witness who had been absent during the morning. At the conclusion of the witnesses'

testimony, the court asked if there were any objections to excusing the witness to return to Dillingham, at which time Petitioner requested a fifteen minute recess. The court permitted Petitioner five minutes within which to make a decision. (T. 103) It was at this time that Petitioner's counsel arrived. (T. 103) The court then excused the jury and recessed.

Upon reconvening the court took notice of Petitioner's counsel's presence in the courtroom and inquired of Petitioner whether an appearance was being entered. Petitioner replied he wanted counsel to enter his appearance. Petitioner then requested that the two prosecution witnesses remain, indicating that he felt severely limited in his cross-examination because of lack of familiarity with procedures and his own ability in cross-examination and expressed the need for assistance in further cross-examination of the State's witnesses. (T. 103-104) The court denied that request, indicating that Petitioner had questioned the witnesses sufficiently, excused the witnesses and again recessed, directing Petitioner to decide whether counsel would enter his appearance. (T. 104)

When the court again resumed its session, Petitioner requested a continuance until the following morning at 9:00 a.m. to enable counsel and himself to review the evidence and present possible defenses. (T. 105) The court then challenged Petitioner as to why his attorney had not appeared earlier. Petitioner explained his several attempts to obtain a continuance and his lack of funds to procure counsel until late the preceding afternoon. (T. 106-107) Having just moments before excused all prosecution witnesses, the court then delivered its ultimatum. On condition that counsel enter his appearance then and there, the court would continue the trial until 9:00 a.m. the following morning. (T. 108) Counsel, noting to the court that he had not had an opportunity to review the

case, had been permitted only twenty-five minutes by the court to discuss the case with his prospective client, and in view of the fact that it was a felony charge and considering the serious nature of the matter and the fact that the State had already rested their case, responded as follows:

> Mr. Smith: Your Honor, I think that I cannot — I cannot say whether I will enter an appearance on the defendant's behalf until I have a chance to review what the case is all about. For me to just jump into the middle of a case at this juncture — basically the State's rested. I haven't had a chance to cross-examine any of the witnesses. I haven't had an opportunity to review the police reports. I haven't had a chance to question any of the witnesses. I haven't had a chance to do — to ensure the discovery has been made by the State. I don't know (indiscernable) State's made discovery in this case. I haven't had an opportunity to do any of the things that would normally be associated with a trial. The only thing is that Mr. Gottschalk has asked me what he — where he should go from here. I can't tell him in twenty-five minutes. Can't even review it. I can't make a determination whether I should even enter an appearance in this case.

(T. 108-109) The court then, for the third time that day, denied defendant's motion for a short continuance, directing that trial proceed. (T. 109)

Petitioner presented no evidence. The case was argued, instructions were read, the jury retired to deliberate. Later in the evening, the jury returned with a question regarding the instructions. (T. 125-126) Still later, the court reconvened to place on the record the circumstances of the day's first motion for a continuance. (T. 126-128) Thereafter the jury returned the compromised verdict of Petit Larceny, even though the only evidence in the case established the value of the item at a minimum of $500.00. (T. 25)

The Petitioner appealed his conviction to the Supreme Court of the State of Alaska, which affirmed the judgment of the Superior Court.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning the protection of constitutional rights guaranteed the accused in the criminal justice process. The right to effective assistance of counsel is the most fundamental of all rights guaranteed to criminally accused and, as held repeatedly by this Court, there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. *Chapman v. California,* 386 U.S. 18 (1967). The absence of counsel for the defendant in a criminal trial constitutes a presumptive violation of the Sixth Amendment right to effective assistance of counsel which cannot be deemed harmless error. *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Chapman v. California,* 386 U.S. 18 (1967).

However, the question presented to this Court for review is not merely the question of absence of counsel. The Sixth Amendment to the Constitution guarantees that "[I] all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Since the Sixth Amendment, made binding on the states by the due process clause of the Fourteenth Amendment, constitutionally entitles one charged with a crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a state court's authority to deprive an accused of his life or liberty. If an accused does not waive his right to counsel, to compel him to continue trial

without counsel is a contravention of accepted principles of due process.

In *Johnson v. Zerbst,* 304 U.S. 458 at 464, this Court, in holding that the right to counsel had not been waived, stated:

> It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the laws of fundamental rights.'

The test established by *Johnson v. Zerbst, supra,* at p. 464, is whether there has been "an intentional relinquishment or abandonment of a known right or privilege." The Supreme Court of Alaska ignored the clear mandate of that test in that not only was no waiver elicited from Petitioner, but Petitioner continually informed the trial court that he wished to exercise that right.

The accused's right to be heard and to confront witnesses brought against him would be of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent layman has little skill in the science of law or familiarity with rules of evidence. *Powell v. State of Alabama,* 287 U.S. 45, 68-69 (1932); see also *Johnson v. Zerbst,* 304 U.S. 458.

The record is replete with instances clearly evidencing that not only did Petitioner fail to waive his right to counsel but requested the assistance of counsel, indicating to the court his own perceived inadequacies in representing himself. This is not a situation where a defendant may be held to have expressly waived the right to counsel and elected to represent himself at trial.

The right to counsel is a basic right, and the right to choose one's own counsel is a vital element in that right. Court or prosecution conveniences are to be of secondary consideration

in the search for the waiver of this important right. The desire for judicial expedition can furnish no justification for the subversion of the Sixth Amendment to present an effective defense through counsel.

This Court has held clearly that every request for continuance to seek counsel need not be granted and that denial is within the proper exercise of the court's discretion. *Avery v. Alabama,* 308 U.S. 444 (1940). "Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Frethe,* 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4." *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964).

In holding that Petitioner was not entitled to a few hours delay requested to allow him to enjoy his right of counsel, especially in view of the court's granting of the prosecution's request for delay to further the State's case, the Court below permitted a blatant denial of Petitioner's Sixth Amendment right to effective assistance of counsel. The result of the denial was that Petitioner defended himself reluctantly, unwillingly and greatly to his detriment.

Due process requires fundamental fairness. Petitioner's right to due process and a fair trial of the criminal charges against him cannot be subject to abridgment upon the weak basis of judicial economy. The result of this abridgment was aptly stated by the Court in *U.S. v. McMann,* 252 F.Supp. 539 (1966).

> In my judgment, Gideon's trumpet, which blew a steady and welcome note that no man in this country should be put to trial on a serious charge without a lawyer when he wanted one, would be drastically muted if this conviction and severe sentence are allowed to stand. (*Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799)

Here, the Supreme Court of Alaska placed a higher value on the immediacy of judicial economy than the clearly more substantial and overriding concern of a fair opportunity afforded the Petitioner of safeguarding his Sixth and Fourteenth Amendment rights to have assistance of counsel for defense and due process of law.

The judgment below is a unique and egregious departure from decisions of the Court which require that no defendant in this country be denied assistance of counsel when he requests it and it is imminently available. As such, it represents a breach in the protections of the Sixth Amendment historically so jealously guarded by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this _____day of February, 1980.

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THE SUPREME COURT
OF THE STATE OF ALASKA

GEORGE F. GOTTSCHALK, JR., *Appellant,* v. **STATE OF ALASKA,** *Appellee.*	File No. 3721 **OPINION** [No. 1961 — November 9, 1979]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Victor D. Carlson, Judge.

Appearances: Charles G. Evans, Smith & Taylor, Anchorage, for Appellant. Paul E. Olson, Assistant District Attorney, Anchorage, Joseph D. Balfe, District Attorney, Anchorage, and Avrum M. Gross, Attorney General, Juneau, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Boochever, and Matthews, Justices, and Dimond, Senior Justice. [Burke, Justice, not participating.]

MATTHEWS, Justice.

Appellant, George Gottschalk, Jr., appeals his conviction for

petty larceny.[1] He raises three issues: whether the trial court abused its discretion by denying his several requests for trial continuances; whether he was denied his right to counsel; and whether his sentence was unlawful and excessive. We affirm the decision of the trial court.

On September 22, 1977, Gottschalk was convicted in Naknek of petty larceny, a lesser-included offense to the original charge of grand larceny on which he was tried and acquitted. This was the second time appellant was tried on these charges, the first trial having ended in a hung jury. At the first proceeding, Gottschalk represented himself after the court found that he had waived his right to counsel.[2]

The first trial ended on February 2, 1977. At that time, retrial was set for June 21, 1977,[3] on condition that Gottschalk could move for a continuance if it became apparent that the scheduled date would conflict with his commercial fishing dates. A continuance was subsequently granted, and the case was continued to September 21, 1977.

[1]/AS 11.20.140 provides:

Larceny of money or property. A person who steals money, goods, or chattels, or a government note, a bank note, promissory note, bill of exchange, bond, or other thing in action, or a book of accounts, order or certificate concerning money or goods due or to become due or to be delivered, or a deed or writing containing conveyance of land or interest in land, or a bill of sale, or writing containing a conveyance of goods or chattels or interest in them, or any other valuable contract in force, or a receipt, release, or defeasance, or a writ, process, or public record, which is the property of another, is guilty of larceny. Upon conviction, if the property stolen exceeds $100 in value, a person guilty of larceny is punishable by imprisonment in the penitentiary for not less than one nor more than 10 years. If the property stolen does not exceed $100 in value, the person, upon conviction, is punishable by imprisonment in a jail for not less than one month nor more than one year, or by a fine of not less than $25 nor more than $100.

Nine or ten days prior to trial, Gottschalk contacted Assistant District Attorney Gene Cyrus asking him for additional time so that he could transport his boat to Seward. Mr. Cyrus informed Gottschalk that he opposed the delay, and Gottschalk made no further application to the court for a continuance until after the trial began.

Trial commenced as scheduled and Gottschalk again appeared without counsel. The first day ended early after all the available jurors had been questioned. During the afternoon, Gottschalk obtained a loan from a friend so that he could hire an attorney.

Before trial resumed the following morning, Gottschalk informed the court that Anchorage attorney Anthony Smith would be arriving in Naknek later that day to represent him. He requested a four-day continuance in order to consult with his attorney and prepare a defense. The court denied appellant's request and proceeded with the jury selection.

[2]/ Forty-nine days prior to the first trial, appellant's counsel withdrew from the case citing an incurable communication breakdown with his client as his reason. Despite the fact that the court made several inquiries of Gottschalk to ascertain who would represent him, Gottschalk failed to engage an attorney. On the Friday before his scheduled Tuesday trial, Gottschalk contacted the court's law clerk and made a request for a court-appointed attorney. An evidentiary hearing was held on Monday and the court determined that Gottschalk failed to qualify under AS 18.85.170(4) for appointment of counsel at public expense. Specifically the court entered findings that Gottschalk had sufficient financial resources to hire an attorney, expended little effort to secure one, failed to make a timely request for appointed counsel, and possessed sufficient understanding of court procedures to represent himself in court.

[3]/Appellant waived his right to have a retrial within 120 days of mistrial. *See* Rule 45(c)(2), Alaska R. Crim. P.

The court recessed mid-morning after the prosecution's last witness failed to arrive. The district attorney took the opportunity to propose jury instructions for the court's consideration. Gottschalk objected and asked that the court wait for his attorney to arrive before considering the instructions. The court denied appellant's request stating that since Mr. Smith never filed a notice of appearance in the case, he would not be arguing in it.

Smith arrived in court at the completion of the state's case. After a brief conference with his attorney, Gottschalk made another request for continuance until the following morning. The court inquired of Mr. Smith if he was willing to enter an appearance at that time. When Smith declined to do so stating that he needed more time to review his client's case, the court denied the motion. Gottschalk subsequently rested without presenting any witnesses on his behalf. The case was argued, the jury instructed, and a verdict returned before the day was out.

Attorney Smith did appear for Gottschalk at sentencing. Gottschalk received a six-month sentence, with three months suspended and two years probation. He was also ordered to pay two hundred fifty dollars in restitution. Execution of sentence has been stayed pending this appeal.

The denial of a request for continuance falls properly within the discretion of the trial court and will not be disturbed on appeal unless the discretion has been clearly abused. *Salazar v. State,* 559 P.2d 66, 71 (Alaska 1976); *Green v. State,* 544 P.2d 1018, 1020 (Alaska 1976). "[T]he prime focus of inquiry must be on the reason for the requested continuance," but we will also consider whether the moving party has acted diligently and in good faith. *Salazar,* 559 P.2d at 72.

Gottschalk directs our attention to several decisions by this

court in which we have found an abuse of discretion for denial of a party's motion for continuance in order to prepare for trial. However, each of the cases, unlike the present one, involved circumstances beyond the control of the requesting party. In *Doe v. State,* 487 P.2d 47 (Alaska 1971), a defendant minor was given but one day notice by the state to appear for his final dispositional hearing. In *Klockenbrink v. State,* 472 P.2d 958 (Alaska 1970), initial counsel withdrew from the case less than four days before trial. In *Barrett v. Gagnon,* 516 P.2d 1202 (Alaska 1973), counsel in a civil suit withdrew on the day of trial because of a schedule conflict.

Gottschalk also contends that he lacked adequate funds to secure an attorney. We consider this excuse to be contrived and unpersuasive.[4] The trial court determined prior to the first trial that Gottschalk had sufficient assets to afford his own counsel. Where a defendant is financially able to engage an attorney, he may not use his neglect in hiring one as a legitimate reason for delay. *United States v. Yamashita,* 527 F.2d 954, 955 (9th Cir. 1975); *United States v. McMann,* 386 F.2d 611, 618 (2d Cir. 1967), *cert. denied,* 390 U.S. 958, 19 L.Ed.2d 1153 (1968); *Relerford v. United States,* 309 F.2d 706, 708 (9th Cir. 1962).

We acknowledge that a continuance of several hours or one day may have been reasonable in this case. However, we cannot say that the trial court's denial constituted an abuse of

[4]/We note that appellant offers no explanation as to why he did not attempt to obtain a loan before trial began. Nor does appellant explain why no request was made before the trial for either a continuance or another hearing to determine if he was eligible for court-appointed counsel. Appellant was fully informed at the conclusion of his first trial that he could renew his application for a public defender. Appellant represented to the court that he would retain private counsel for retrial.

discretion. Any delay would have seriously inconvenienced the court, an Anchorage judge temporarily sitting in Naknek, the prosecutor, and at least one witness who traveled from Dillingham. "While blind adherence to the requirements of court calendaring should never be used as an excuse to deny one accused of a serious crime the fundamental right to organize his defense, there is a compelling public interest in the prompt and orderly disposition of such matters." *Green v. State,* 544 P.2d 1018, 1023 (Alaska 1976) (footnote omitted).

We conclude that the seven months between Gottschalk's first and second trials afforded him more than a reasonable time to engage an attorney. As he made no effort to retain counsel during those months, Gottschalk's failure can only be attributed to his lack of diligence. Under the circumstances, we must hold that the trial court acted within its discretion in denying appellant's requests for trial continuances.

In a related argument Gottschalk contends that he was denied his right to counsel under the Alaska and United States Constitutions. The record demonstrates that a full pretrial hearing was held in January, 1977, at which time the trial judge determined that Gottschalk waived his right to counsel. Gottschalk does not contest this finding. However, he asserts that a second hearing on the matter should have been held after the mistrial to determine whether he waived his right on retrial.

We hold that a second hearing was unnecessary in this case. In order for there to be a constitutional waiver, the trial judge must satisfy himself that the defendant is capable of presenting his case in a rational and coherent manner and that the defendant understands the benefit he is giving up by foregoing legal counsel. *O'Dell v. Municipality of Anchorage,* 576 P.2d 104, 107 (Alaska 1978); *McCracken v. State,* 518 P.2d 85, 91

(Alaska 1974). The waiver must appear affirmatively on the record, *O'Dell v. Municipality of Anchorage,* 576 P.2d at 108, and will not be inferred. *Ledbetter v. State,* 581 P.2d 1129, 1131 (Alaska 1978). All the requirements for waiver having been satisfied at the pretrial hearing, we must conclude that Gottschalk's inaction preceding retrial constituted a continuation of the voluntary waiver of his right to counsel. It has been well established that a non-indigent defendant who fails to retain an attorney within a reasonable time before trial may be found to have waived his right to counsel. *Ungar v. Sarafite,* 376 U.S. 575, 589, 11 L.Ed.2d 921, 931 (1964); *United States v. Robinson,* 543 F.2d 951, 963-964 (2d Cir. 1976); *United States v. Casey,* 480 F.2d 151, 152 (5th Cir. 1973); *United States v. McMann,* 386 F.2d at 618; *Relerford v. United States,* 309 F.2d at 708.

As we also find Gottschalk's sentence to be lawful and not excessive, the decision of the superior court is hereby AFFIRMED.

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RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1392

GEORGE F. GOTTSCHALK, Jr.,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

OPINION BELOW

The opinion of the Alaska Supreme Court in this case is found in *Gottschalk* v *State,* 602 P.2d 448 (Alaska 1979).

JURISDICTION

The Petitioner Gottschalk has properly invoked this Court's discretionary jurisdiction under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Could the trial court properly rule that Gottschalk had waived his right to counsel, and deny his motion for continuance made on the second day of trial to obtain counsel, when the trial court found that Gottschalk had both the necessary resources and a reasonable amount of time to employ counsel?

STATEMENT OF THE CASE

The Petitioner, George F. Gottschalk, Jr., was initially charged with grand larceny on August 9, 1976. (R. at 1) He was arraigned three weeks later, and he appeared at this arraignment with retained counsel. (Log Nos. 2179-2221) The attorney-client relationship eventually began to suffer, however, because Gottschalk refused to keep in touch with his attorney, and had not yet paid him for a previous representation; six weeks before Gottschalk's trial date, his attorney moved to withdraw. (R. at 47) (Log Nos. 001-0092)

The trial court concluded that, while the financial problem was not unresolvable, the personal differences between Gottschalk and his attorney were too great; the motion to withdraw was granted. (R. at 47) Trial was still scheduled for February 1, 1977. A few days before trial, Gottschalk asked the court to appoint a lawyer for him, claiming for the first time that he lacked the financial resources to employ his own attorney. In denying Gottschalk's motion for a court-appointed attorney, the trial court found (R. at 46-48):

(1) Gottschalk had never raised the question of lack of financial resources until the Friday (two working days) before trial.

(2) Gottschalk had sufficient resources to employ his own attorney, including equity in an airplane and a fishing boat, but made no real effort to collect the necessary money.

(3) Gottschalk had only contacted one other attorney in the six weeks since his first lawyer had left the case.

(4) Gottschalk had sufficient intelligence and understanding of court procedures to proceed without an attorney if need be.

Based upon these findings, the trial court ruled that Gottschalk had waived his right to an attorney, and the trial began

the next day (February 1, 1977) with Gottschalk representing himself. The trial ended on February 2nd with a hung jury.

The State indicated that it would re-try Gottschalk, and asked for a June trial date so that its witnesses could easily be present. Gottschalk told the court that he would employ his own attorney for this second trial. (Log. Nos. 0759-0861) The trial was subsequently continued until September, 1977, at Gottschalk's request, so that he could take advantage of an uninterrupted commercial fishing season.

About a week before trial, Gottschalk contacted the prosecuting attorney handling the case and requested a continuance of trial so that he could take his fishing boat to Seward (the distance involved made a round-trip impossible without a change in the trial date). While Gottschalk claims in his Petition (p. 4) that he expressly told the prosecutor the trip was for the purpose of obtaining funds to employ an attorney, the State of Alaska does not believe the record bears him out. (Tr. at 106-07) In any event, Gottschalk made no attempt to apply to the trial court for a continuance (after the prosecutor refused to stipulate to one) until the day of trial. *Gottschalk* v *State,* 602 P. 2d at 450.

The second trial began on September 21, 1977, with Gottschalk again representing himself. Sometime during the afternoon, Gottschalk obtained a loan from a friend to hire an attorney. When court resumed session the next day to continue jury selection, Gottschalk requested a four-day continuance to consult with attorney Anthony Smith and prepare a defense; Gottschalk told the court that Smith would be arriving by plane that afternoon. 602 P.2d at 450. The trial court denied this motion.

Jury selection was completed, and the State presented all but one witness, A recess was then called, due to the fact that

the State's last witness would not arrive by plane for another hour. During this recess, the prosecutor proposed two jury instructions. Gottschalk again asked for a continuance, but the trial court denied it, noting that attorney Smith had never entered an appearance in the case and would therefore not be allowed to intervene in it.

Anthony Smith arrived that afternoon, after the final prosecution witness had testified. Gottschalk again requested a continuance (this time, only until the following morning) to consult with Smith about the possible presentation of a defense. The trial court indicated that it might relent from its earlier refusal to allow Smith to intervene, providing Smith would enter a formal appearance on behalf of Gottschalk. However, attorney Smith declined to enter an appearance until he had time to study the case. At this point, the court again denied Gottschalk's motion for continuance.

The trial proceeded with Gottschalk choosing to present no defense. This time, the trial ended in a verdict of guilty on the lesser-included offense of petit larceny (a misdemeanor). Gottschalk received a sentence of six months' imprisonment, with three suspended; he was placed on probation for two years.

(All of the above facts are taken from the Alaska Supreme Court's recital of the case, 602 P.2d at 450.)

Gottschalk then appealed his conviction to the Alaska Supreme Court, alleging that his right to counsel had been denied. In rejecting Gottschalk's claim and affirming his conviction, the Alaska court ruled that the seven months between Gottschalk's first trial and his second afforded him adequate opportunity to engage an attorney (602 P.2d at 451), and that Gottschalk's claim of financial incapacity to hire his own lawyer was "contrived and unpersuasive". (602 P.2d at 450, and especially n. 4)

The Alaska court also ruled that the trial court had acted correctly when it found that Gottschalk had waived his right to counsel at the hearing held just before Gottschalk's first trial. The supreme court found that the record affirmatively showed (1) Gottschalk's understanding of the benefit he was giving up, (2) his failure to retain an attorney even though he was afforded reasonable time and possessed adequate resources, and (3) his ability to present his own case in a rational and coherent manner. (602 P.2d 451)

This being so, and with the underlying circumstances essentially unchanged at the beginning of the second trial, the Alaska court ruled that there was no legal necessity for the trial court to hold another hearing on the issue prior to Gottschalk's second trial.

REASONS FOR DENYING THE WRIT

THE ALASKA SUPREME COURT FOLLOWED THE APPLICABLE FEDERAL AUTHORITY ON RIGHT TO COUNSEL IN AFFIRMING GOTTSCHALK'S CONVICTION

Gottschalk's complaint is two-fold. He argues that the Alaska court erroneously found him to have waived his right to counsel, and he argues that the Alaska court erred when it upheld the trial court's decision to deny Gottschalk's motion for continuance (made mid-way during his second trial).

First, it is clear that if a person has adequate resources to employ an attorney and an adequate opportunity to do so, and yet no attorney is employed, a waiver of the right to counsel may be inferred. *United States* v *Casey*, 480 F.2d 151 (5th Cir. 1973); *United States* v *McMann*, 386 F.2d 611 (2nd Cir. 1967);

see also *Relerford* v *United States*, 309 F.2d 706 (9th Cir. 1962).

On the day before Gottschalk's first trial commenced, the trial court found that Gottschalk had waived counsel under the above test, and further found that Gottschalk understood the benefits of counsel that he was foregoing, and was capable of proceeding without counsel. As noted by the Alaska supreme court, Gottschalk has never questioned the correctness of that particular ruling. (602 P.2d at 451) Further, the record supports the trial court's ruling. Finally, the fact that Gottschalk represented himself at his first trial (which ended in a hung jury) inferentially supports the trial court's finding of Gottschalk's capacity to present a coherent defense.

Gottschalk's argument to the Alaska supreme court was that the trial court should have held yet another hearing on this same issue before allowing Gottschalk's second trial to commence. But there is nothing in the record to demonstrate that anything had changed in regard to either Gottschalk's understanding of the benefits of an attorney or Gottschalk's ability to conduct his own defense.

Since Gottschalk had more than seven months to employ an attorney for his second trial (after indicating to the court that he would retain private counsel), the only facet of the test that might have changed was Gottschalk's financial ability to hire a lawyer. The trial court found, and the Alaska Supreme agreed, that Gottschalk had sufficient resources to hire an attorney. Gottschalk never asked for a court-appointed attorney for his second trial, and on appeal the Alaska court found his arguments of insufficient resources to be unconvincing. Gottschalk has not presented anything in the record to rebut this conclusion by the Alaska Supreme Court, and indeed Gottschalk retained counsel to prosecute his appeal both in Alaska and before this Court.

Gottschalk then argues that, even assuming the legal validity of the court's finding that he had waived his right to counsel, the court erred in denying him a continuance (after the second trial had begun) to consult with a lawyer that Gottschalk was flying in from Anchorage. In other words, Gottschalk is arguing that he was free to change his mind and seek legal counsel even at that late date. This is not so. *United States* v *Casey, supra, United States* v *McMann*, supra, *United States* v *Yamashita*, 527 F.2d 954 (9th Cir. 1975).

The question involves a balancing of the defendent's right to an attorney versus the real possibility that a defendant may attempt to thwart the orderly working of the courts by retaining or discharging counsel at critical times so as to create confusion or delay. The decision regarding a continuance of trial under the circumstances presented by Gottschalk's case is entrusted to the discretion of the trial court, and this decision will not be overturned unless the court's discretion has been abused. *Ungar* v *Sarafite*, 376 U.S. 575 (1964).

The Alaska Supreme Court recognized this to be the controlling law, and on the facts of Gottschalk's case found that the trial court had not abused its discretion. Gottschalk's failure to have an attorney at the commencement of the second trial was clearly due to his own lack of diligence, rather than factors beyond his control. When the trial court finally agreed to meet Gottschalk halfway if attorney Smith would enter an appearance, Smith declined to do so.

CONCLUSION

The Alaska Supreme Court did not depart from federal precedent in this case, either on the issue of waiver of right to

counsel, or on the issue of the trial court's failure to grant Gottschalk's tardily requested continuance of his second trial. Neither the law nor the facts of this case cry out for a different result. Gottschalk's petition for writ of certiorari should be denied.

Respectfully submitted this 19th day of May, 1980.

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